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IN THE

Supreme Court of the United States

October Term, 1958

No. 732

MURRAY BERMAN and MAYFLOWER MANUFACTURING CORP.,
Petitioners

—v.—

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. The Government's brief underscores the urgency for certiorari here in light of the refusal below to observe the rules of *Holland* v. *United States*, 348 U. S. 121 (see Pet. 15-18).*

The Government does not question our reading of *Holland* to impose rules of judicial administration not only for net worth tax prosecutions but also for other criminal cases where proof of guilt likewise lies in accounting tabulations. What the Government says is that those rules are

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* The reference "Pet." is to our petition (in No. 732). The reference "Gov't. Br." designates the Brief for the United States in Opposition. The reference "R —" is to the printed record.

inapplicable here because the accounting in this case "was not, as in the net worth tax cases . . . , made the primary proof of the crime charged, and hence those cases are not in point" (Gov't. Br. 16). But, as the record discloses, this is just not so.

Government Exhibit 177, the purported accounting of the alleged shortage of Government serge, and the "paper test" from which it was largely derived constitute not only the "primary proof" offered by the Government on the substantive charge, but practically the only proof on the conspiracy charge. It is not our petition but the Government's brief which "misconceives the role of that evidence in the Government's case." (*id.* 15).

The Government concedes that the only *direct* evidence adduced by the prosecution was that petitioners, on Abrams' behalf, sold 19,000 yards of serge at a time when Abrams' concern, Fabric Garment Co., was in possession of substantial quantities of Government serge (*ibid.*).[1] That evidence, however, did not establish what was vital to the prosecution: that the 19,000 yards sold was *Government* serge. This, we contend, the jury was asked to and improperly did infer from the "paper test" and the accounting tabulation —all without regard to the procedural safeguards *Holland* imposes. The Government, on the other hand, now insists that such accounting evidence was "merely corroborative" (*id.* 16), that identification of the 19,000 yards as Government property was established not from that evidence but by reasonable inference from "the surrounding circumstances" (*id.* 18). Let us therefore look at the record.

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[1] Abrams and Fabric, co-defendants, are the petitioners in No. 733.

These so-called "surrounding circumstances" of which the Government speaks are listed on page 15 of its brief. We consider them *seriatim*:

(a) First, there is the "surreptitious manner of payment" for the 19,000 yards sold to Alert Trading Co. By this, it appears, is meant the issuance of the $15,000 check from petitioner Mayflower's account, made payable to Abrams' Washington attorney, and the subsequent purchase by that attorney of two oil leases for Abrams at a cost of $15,000 (Gov't. Br. 5). Since it is not disputed that the sale was for Abrams' account; and that the proceeds, though deposited initially in Mayflower's bank account, belonged to Abrams, except for the commission payable to Berman; and that Abrams duly reported receipt of the entire proceeds, less commission, on his income tax returns—we find it most difficult to conceive how one reasonably can infer from this "circumstance" that the 19,000 yards sold to Alert was Government serge. Issuance of a check by a debtor payable to a third party designated by the creditor is by no means an unusual occurrence in the business world; certainly it is not a "surreptitious" device or one indicative of criminal conduct.[2]

(b) Second is the fact that the sale to Alert was "at somewhat less than the market price." This "circumstance" likewise is hardly indicative of theft; particularly in light of the testimony that Abrams had for some years previously

[2] The Government's brief (p. 5) suggests that the bank account in which the proceeds of the Alert sale were deposited was "opened by Berman in Mayflower's name" for that very purpose. This is belied by the record. The Mayflower account was opened, presumably in the normal course of business, on July 27, 1950, long before the inception of the conspiracy charged here (R. 532).

been in possession of quantities of substandard serge, a much more reasonable explanation for the small difference in price ($3.90 as compared with $4.25) (R. 587-588, 590-591).

(c) Third, there is the "finding of a Government mill ticket at the Mayflower premises where the cloth sold was admittedly stored." As the Government notes, however, the existence on the Mayflower premises of a mill ticket originally attached to Government goods furnished to Fabric is not, in itself, proof that the 19,000 yards of serge sold from those premises were Government goods; for there was testimony that for a time Fabric had stored mill tickets removed from Government goods on those very premises (R. 632). More significantly, the record discloses that the mill ticket on which the Government relies (Exhibit 6) *could not possibly have been related to the 19,000 yards of serge sold to Alert.* That mill ticket identified and came from a shipment of goods which was not shipped to Fabric *until March 17, 1951,* and the Government concedes that the allegedly misappropriated serge "had been delivered by Abrams to Berman [that is the Mayflower premises] *in January or February, 1951*" (Gov't. Br. 4).[3] Thus, the mill ticket in question could not conceivably have established that the 19,000 yards of serge sold to Alert was part of the serge furnished by the Government to Fabric.

[3] That the goods identified by the mill ticket were not shipped until March 17, 1951, appears from Exhibit 21-B-16, the Quartermaster's tally sheet, which lists among the rolls of serge shipped on that day, Piece No. 616146, the very number appearing on the mill ticket in question. That the ticket indicates that the goods it identified had been shrunk at the Quartermaster Depot on January 25, 1951 (see Gov't. Br. 6) does not, of course, establish when it was delivered to Abrams, except that such delivery could not have been earlier than January 25, 1951.

(d) Fourth are the "flight of . . . Berman to avoid inquiry about the sale" and "the concealment by . . . Abrams of Berman's whereabouts." Here, again, there is a marked misconstruction of the record. For, there is no evidence whatever to show that Berman knew, when, on December 27, 1951, he registered at an Atlantic City hotel, that the FBI had been inquiring for him a week earlier. Abrams had been so advised, but there is nothing to indicate that Abrams had told Berman. All that appears is that Berman, with his place of business closed, elected to spend New Year's Day and the ensuing weeks in a resort community and registered at a hotel there under a name different from his own. It is most unfair for the Government to exploit the coincidence in time between Berman's Atlantic City holiday and the initiation of the FBI investigation to create an unwarranted atmosphere of suspicion and crime.[4]

(e) Finally, there is Abrams' effort "to retrieve from the trucking company the receipts showing the deliveries of cloth to Alert." The pertinent evidence in this respect, again given undue and improper emphasis in the Govern-

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[4] The extent to which the Government is prepared to strain the record is exemplified here. Thus, there is no evidence to support the Government's statement that Abrams "denied having seen Berman" (Gov't. Br. 5). The testimony is merely that when the FBI agent asked Abrams if he knew Berman's whereabouts or how the agent might get in touch with him, Abrams replied that Berman came into his plant from time to time, that he thought Berman lived in White Plains, New York, but that he neither knew his home address nor how to get in touch with him. There is nothing inconsistent between Abrams' reply and the advice given to the FBI agent by co-defendant Hyman that Hyman had seen Berman in the Fabric plant some three weeks before February 12, 1952. *For, there was no testimony whatever that Abrams was in the plant at the time Hyman said he saw Berman there.* (See R. 67-69).

ment's brief, was simply that when Abrams asked for these receipts, the trucker inquired whether he wanted them for any particular reason, whereupon Abrams responded that he wanted them; and that when the trucker gave Abrams photostatic copies of the receipts, he "was really mad about it" (R. 151). Here, again, it is impossible reasonably to read into this "circumstance" proof of guilt.

In short, these several "surrounding circumstances" comprise the weakest of reeds on which to support an inference of criminal conduct, let alone to support guilt beyond a reasonable doubt. Whether viewed singly or in combination, they certainly fall far short of such proof as warrants the submission of a criminal case to the jury. This, the prosecution here realized; and, consequently, the "paper test" and the accounting tabulation derived therefrom were put in evidence and stressed as major proof of the alleged misappropriation of Government surge. This accounting evidence was the very heart of the Government's case in support of its charge of theft against petitioners.

Beyond this, such accounting evidence was practically the *only* proof offered in support of the conspiracy count against petitioners. The conspiracy charged was to submit false statements to the United States. There was no evidence whatever that petitioners here knew that such statements were required to be filed or were in fact filed. The only proof in support of their conviction was that offered in connection with the falsity of the statements. And that proof consisted solely of the accounting tabulation.

In these circumstances, the rules announced by this Court in *Holland* were brought into play and, as the Government itself now appears to concede, should have been observed.

2. To our argument that petitioners were here denied the right of effective cross-examination as to the validity of the "paper test" (Pet. 18-20); the Government, admitting that no witnesses as to its validity were offered for cross-examination (Gov't. Br. 18, n. 19), cavalierly responds that that was of no significance because the " 'paper test' was used only as a way of measuring the area of a pattern, and its validity for that limited purpose cannot be questioned" (*id.* 16).

The fact is, however, that the "paper test" was much more vital to the prosecution than the Government's brief now suggests. It is a relatively simple matter to measure the area of a paper pattern; and, had that been the only function of the test, there would have been no dispute. What the prosecution did at the trial, however, was to equate their measurements of the paper pattern areas, made under laboratory conditions, to areas of serge cloth produced under actual high-speed manufacturing conditions. It was the validity of such an equation, treating laboratory paper measurements as actually representing parts of manufactured jackets that was in issue, and most vital to the Government's case. That such an equation was most vital to the prosecution is plain when one realizes that the figures in the third line of Exhibit 177 ("Yards of Serge, etc.") are derived from this "paper test." And, since, as is conceded, no witnesses were offered to testify as to the propriety of the translation effected from paper to serge, petitioners could [illegible] ssibly cross-examine as to the validity of the procedure.

It is significant that when public officers have sought to utilize similar experimental devices to measure areas of cloth in connection with accountings under Government contracts, their efforts have been rejected by Government appeals boards. See *Keystone Coat & Apron Mfg. Corp.*, ASBCA No. 4446, Navy Appeals Panel, Jan. 13, 1959, 59-1 BCA par. 2056; *Langwear, Inc.*, ASBCA No. 3607, Navy Appeals Panel, June 18, 1957, 57-1 BCA par. 1336. As the board stated in the Keystone proceeding: ". . . The method by which the Government measured the scrap in its post-contract audit was . . . an entirely theoretical one, the result of measurements and computations made by one who had no part in and did not observe the actual production of the trousers. . . . The reliability of the Government's actual measurements could not be adequately tested by cross-examination." If such devices as the "paper test" are deemed unreliable in proceedings involving only contract accountings, how much more must they be condemned where, as here, they have been utilized in a criminal case involving the liberties of the accused.

3. Defending the trial court's denial of petitioners' motion for a new trial, the Government's brief (p. 18) cites *United States v. Johnson*, 327 U. S. 106, where this Court noted the importance "for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances . . . ." (At 111). In our case, however, there was no "conflicting evidence" as to the newly discovered evidence. The several affidavits of the defendants and their counsel averred that although Oliveri had been interviewed prior to trial, he had not advised

them and they did not know that, for a period of some years, he and others in Fabric's employ had been selling large quantities of serge scrap sweepings to junk dealers. Nor was there any dispute that Oliveri had so informed the Government prosecutors prior to the trial and that they in turn had withheld this information from court and jury. What was so shocking was that notwithstanding the absence of conflicting evidence, the trial court cavalierly rejected the sworn statements of the defendants and of their counsel as unworthy of belief. The Government's brief does the same (p. 19).

The tremendous importance of the newly discovered evidence relating to Oliveri and his fellows was that thus, for the first time, the defendants could essay some measurement of that scrap concededly being engendered in the manufacturing process and being disposed of without accounting to the Government. For the first time there was proof that such scrap was so substantial in quantity as to make it impossible that the 19,000 yards of piece goods (as contrasted with scrap!) sold to Alert had been a portion of the Government-furnished serge.

Certainly, in such circumstances and in view of the Government's suppression of the Oliveri evidence throughout the trial, denial of the motion for a new trial was a grievous error.

CONCLUSION

For the reasons stated in our petition and in the petition in No. 733, a writ of certiorari should issue.

Respectfully submitted,

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